

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NORTHWESTERN UNIVERSITY

Employer

and

CASE NO. 13-RC-121359

COLLEGE ATHLETES PLAYERS

ASSOCIATION (CAPA)

Petitioner

LABOR LAW PROFESSORS' BRIEF AMICI CURIAE

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TABLE OF CONTENTS

BACKGROUND OF AMICI	1
QUESTIONS PRESENTED.....	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE BOARD SHOULD CONTINUE TO APPLY THE COMMON LAW AGENCY TEST UNDER WHICH THE SCHOLARSHIP ATHLETE-EMPLOYEES ARE EMPLOYEES	4
A. The Scholarship Athlete-Employees are Employees Under the Common Law Agency Test	6
B. <i>Brown</i> Does Not Prevent the Scholarship Athlete-Employees From Being Statutory Employees	10
II. THE ACT’S PURPOSES TO EQUALIZE BARGAINING RELATIONSHIPS AND MAINTAIN INDUSTRIAL PEACE WOULD BE FRUSTRATED IF THE SCHOLARSHIP ATHLETE-EMPLOYEES ARE NOT GRANTED EMPLOYEE STATUS.....	11
A. The College Football Industry is a Multi-Billion Dollar Industry Full of Labor- Management Conflicts Deserving of NLRA Coverage.	12
B. The Act Must be Interpreted Broadly in Favor of Granting Employee Status.....	17
C. The Athletes-Employees’ Demands are Typical of Statutory Employees and are Suitable for Resolution Through Collective Bargaining.....	19
D. The Scholarship Athlete-Employees Must Be Protected Because their Employment with the University Has an Indelible Mark on their Ability to Get Hired by the NFL.....	24
E. The Term “Student-Athlete” Was Coined by Management to Deny Labor and Employment Rights to Scholarship Athlete-Employees.....	27
CONCLUSION.....	28
APPENDIX I: SIGNATORY LABOR LAW PROFESSORS.....	29
CERTIFICATE OF SERVICE	34

TABLE OF AUTHORITIES

Cases

<i>Boston Medical Center Corporation</i> , 330 NLRB No. 152 (1999)	11, 18
<i>Brevard Achievement Center, Inc. and Transport Workers Union of America, Local 525, AFL-CIO</i> , 342 NLRB 982 (2004)	5
<i>Brown Univ.</i> , 342 N.L.R.B. 483 (2004)	9, 10, 13
<i>Cornell Univ.</i> , 183 NLRB 329 (1970)	4
<i>New York Univ.</i> , 332 N.L.R.B. 1205 (2000)	18
<i>NLRB v. Town & Country Elec.</i> , 516 U.S. 85 (1995)	4, 9, 18, 19
<i>NLRB v. United Insurance Co. of Am.</i> , 390 U.S. 254 (1968)	6, 19
<i>NLRB v. Yeshiva Univ.</i> , 444 U.S. 672 (1980)	13
<i>Northwestern Univ.</i> , Case 13-RC-121359, 2014 WL 1246914, at *3 (N.L.R.B. Mar. 26, 2014) .	8, 9, 10, 14, 20, 21, 22
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941)	18
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793 (1945)	18
<i>Roadway Package Sys.</i> , 326 N.L.R.B. 842 (1998)	6
<i>Seattle Opera v. NLRB</i> , 292 F.3d 757 (D.C. Cir. 2002)	9
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984)	18
<i>Syracuse Univ.</i> , 204 N.L.R.B. 641 (1973)	13

Statutes

29 U.S.C. § 152(3) (1988 ed.)	4, 19
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Other Authorities

<i>2013 Draft Prospects: Stacy McGee</i> , NFL, http://www.nfl.com/draft/2011/profiles/stacy-mcgee?id=2539285 (last visited June 17, 2014)	25
Amy Daughters, <i>7 Teams That Are More Popular Than Their NFL Counterparts</i> , Bleacher Sports, http://bleacherreport.com/articles/737969-college-football-7-teams-that-are-more-popular-than-their-nfl-counterparts/page/2	14
Amy McCormick & Robert McCormick, <i>The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism</i> , 45 San Diego L. Rev. 495 (2008)	11
Ben Strauss & Steve Eder, <i>N.C.A.A. Settles One Video Game Suit for \$20 Million as a Second Begins</i> , N.Y. Times, June 10, 2014	17
Catherine Fisk & Deborah Malamud, <i>The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform</i> , 58 DUKE LAW JOURNAL 2013 (2008)	5
<i>College Football Maintains Impressive Ratings and Attendance Figures</i> , Nat'l Football Found. (Mar. 8, 2012), http://www.footballfoundation.org/tabid/567/article/51405/College-Football-Maintains-Impressive-Ratings-and-Attendance-Figures.aspx	15, 16

<i>College Football TV Ratings</i> , Sports Media Watch (2014), http://www.sportsmediawatch.com/college-football-tv-ratings .	15
Doug J. Chung, <i>The Dynamic Advertising Effect of Collegiate Athletics</i> , Marketing Sci., Sept.-Oct., 2013.	13, 14
<i>Half-game penalty for Johnny Manziel</i> , ESPN (Aug. 29, 2013), m.espn.go.com/ncf/story?storyId=9609389 .	14, 21, 26
Jason Belzer, <i>2014 NFL Draft 1st Round Rookie Salary Projections</i> , Forbes (May 9, 2014), http://www.forbes.com/sites/jasonbelzer/2014/05/09/2014-nfl-draft-1st-round-rookie-salary-projections . Players are drafted based on how they performed in college.	24
Jeffrey Eisenband, <i>Who Is Kain Colter?</i> , The Post Game (Jan. 29, 2014), http://www.thepostgame.com/blog/men-action/201401/kain-colter-northwestern-football-college-sports-union .	20, 23
Jerry McDonald, <i>NFL Draft: Character a major part of equation</i> , San Jose Mercury News (May 6, 2014), http://www.mercurynews.com/raiders/ci_25709276/nfl-draft-character-major-part-equation .	25
Jerry McDonald, <i>Raiders' Stacy McGee hitting his stride</i> , San Jose Mercury News (Nov. 22, 2013), http://www.mercurynews.com/raiders/ci_24582937/raiders-stacy-mcgee-hitting-his-stride .	25
Julia Tomassetti, <i>Who Is a Worker? Partisanship, the National Labor Relations Board, and the Social Content of Employment</i> , 37 LAW & SOCIAL INQUIRY 815 (2012).	5
Karl Klare, <i>Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941</i> , 62 MINN. L. REV. 265 (1977).	18
Ken Reed, <i>NCAA's Approach to Concussions is Barbaric</i> , Huffington Post (Aug. 14, 2013), http://www.huffingtonpost.com/ken-reed/ncaa-football-concussions_b_3757585.html .	23
Martin H. Malin, <i>Student Employees and Collective Bargaining</i> , 69 Ky. L.J. 1 (1980-1981)	10
Nick Bromberg, <i>Document shows Northwestern's anti-union responses...</i> , Yahoo Sports (Apr. 20, 2014), https://sports.yahoo.com/blogs/ncaaf-dr-saturday/document-shows-northwestern-s-anti-union-responses-to-questions-from-players-024103369.html .	28
Noah Zatz, <i>Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships</i> , 61 Vanderbilt L. Rev. 857 (2008)	6, 12
<i>Northwestern Wildcats Shop</i> , Fanatics, http://www.fanatics.com/COLLEGE_Northwestern_Wildcats (last visited June 17, 2014) ...	17
<i>Northwestern Wounded Warrior Uniforms</i> , Under Armour, http://www.underarmour.com/shop/us/en/armoured/northwestern-university-uniforms (last visited June 17, 2014)	17
Pat McManamon, <i>Johnny Manziel drafted by Browns</i> , ESPN (May 9, 2014), http://espn.go.com/nfl/draft2014/story/_/id/10903195/2014-nfl-draft-johnny-manziel-drafted-cleveland-browns-no-22-overall-pick .	26

Patrick Rishe, <i>Cam-ibalized: The Financial Repercussions of the Cam Newton Scandal</i> , Forbes (Nov. 10, 2010), http://www.forbes.com/sites/sportsmoney/2010/11/10/cam-ibalized-the-financial-repercussions-of-the-cam-newton-scandal	26
Patrick Stevens, <i>Quarterback Kain Colter remains day-to-day with concussion</i> , Syracuse.com (Sept. 13, 2013), http://www.syracuse.com/patrick-stevens/index.ssf/2013/09/northwestern_football_quarterb.html	23
Phillip Rossman-Reich, <i>Former Northwestern Lineman At Front of NCAA Concussion Battle</i> , Lake The Posts (Sept. 30, 2011), http://www.laketheposts.com/2011/09/30/northwestern-concussion-battle-092911	24
Regina A. Corso, <i>As American as Mom, Apple Pie and Football?</i> , Harris Polls (Jan. 16, 2014), available at http://www.harrisinteractive.com	14
Rodger Sherman, <i>Keeping it Real with EA Sports</i> , Sippin' On Purple (July 19, 2013), http://www.sippinonpurple.com/northwestern-wildcats-football/2013/7/19/4537598/venric-mark-kain-colter-option-northwestern-wildcats-football	17
Ryan Wood, <i>Crunching the Numbers: Football Scholarships</i> , Active (2014), http://www.active.com/football/articles/crunching-the-numbers-football-scholarships	19
Sean Gregory, <i>Should This Kid Be Making \$225,047 A Year for Playing College Football?</i> , Time, Sep. 16, 2013	13, 14
Taylor Branch, <i>The Shame of College Sports</i> , The Atlantic (Oct. 2011), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643	27
<i>The Official Online Store of the Northwestern Wildcats</i> , CBS Sports, https://northwestern.cbsscollegestore.com/store.cfm?store_id=176 (last visited June 17, 2014)	16
The Restatement (Second) of Agency (1958).....	7
Timothy Bella, <i>NCAA head games: The 'very skewed' concussion data in college football</i> , Aljazeera America (Jan. 9, 2014), http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2014/1/9/ncaa-head-games-theveryskewedconcussiondataincollegefootball.html	23
Tom Farrey, <i>Kain Colter starts union movement</i> , ESPN (Jan. 28, 2014), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union	28

BACKGROUND OF AMICI

Amici curiae are the law professors and scholars listed in Appendix A. Amici teach, research, and/or write about labor relations and labor law, and have expertise in the issues before the National Labor Relations Board (“NLRB”). The interests of Amici are to maintain the integrity of the law regarding the application of National Labor Relations Act (“NLRA” or “Act”), and to aid the NLRB by explaining how the current-day college football industry is one that must abide by the strictures of the Act. A list of signatories can be found in Appendix A. Institutional affiliations are provided for identification purposes only.

QUESTIONS PRESENTED

What test should the Board apply to determine whether grant-in-aid scholarship football players are “employees” within the meaning of Section 2(3) of the Act, and what is the proper result here, applying the appropriate test?

What policy considerations are relevant to the Board’s determination of whether grant-in-aid scholarship football players are “employees” within the meaning of Section 2(3) of the Act and what result do they suggest here?

SUMMARY OF ARGUMENT

- I. The Board should continue to apply Section 2(3) and the common law agency test to determine employee status, as it has done for many years. In this case, Region 13 reached the correct result when it applied the common law agency test to determine that the Northwestern University (“Employer” or “University”) grant-in-aid college football players (hereinafter referred to as “Scholarship Athlete-Employees”) are employees under the NLRA. However, Region 13 was correct because its decision also conforms to the policies of the Act, as described in Section II of this brief.
- II. The main policies that are relevant to support granting employee status to the Scholarship Athlete-Employees are those concerned with maintaining labor peace through collective bargaining. College football has become a multi-billion dollar industry. Individual and organized players, universities and the universities’ representative, the National College Athletic Association (“NCAA”), have engaged in high profile disputes over pay and terms and conditions of the Scholarship Athlete-Employees given the high monetary stakes involved for all the parties in this multi-billion industry. Disputes range from the type and amount of pay that the Scholarship Athlete-Employees should receive, who can benefit from the image of the players, to how protect players’ health during and after their tenure in college football, discipline, among many others. The NLRA was designed explicitly to resolve these types of disputes over pay and terms and conditions of employment. Deciding against employee status would frustrate the core principles of the NLRA and maintain a status quo of labor-management strife in college football that can only result in hurting not only the Scholarship Athlete-Employees, the most vulnerable and least organized party in the industry, but also the industry itself, which remains mired in controversies over such strife.

ARGUMENT

I. THE BOARD SHOULD CONTINUE TO APPLY THE COMMON LAW AGENCY TEST UNDER WHICH THE SCHOLARSHIP ATHLETE-EMPLOYEES ARE EMPLOYEES

There is no bright line rule that answers whether or not college football players are employees under the NLRA; the Act says nothing explicit about the employee or non-employee status of college football players. Rather, the NLRA's Section 2(3) defines employee as "employees of any employer." The statute provides a number of exceptions, such as agricultural and domestic employees, but college football players, or "student-athletes" as the Employer claims the college football players are, are not in those stated exceptions. 29 U.S.C. § 152 (3). Without further definition, the Board has had to rely on a common law agency test to determine employee status and guide itself under the purposes of the NLRA.

In this brief we do not take the position that the Board must move away from the common law agency test, even if it could. The Supreme Court has determined that the Board cannot use a different test other than the common law agency control test to determine independent contractor status versus statutory employee. *See NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995). However, the case at hand is not about whether the Scholarship Athlete-Employees are independent contractors, but whether they are students. Absent clear statutory guidance, and given changing conditions, the Board could use a different test to determine employee status. *See Cornell Univ.*, 183 NLRB 329, 332 (1970) ("After carefully examining all the evidence submitted, we are compelled to conclude that, whatever guidance the 1947 Conference Report provided to the situation which existed in 1951 when Columbia University was decided, the underlying considerations no longer obtain two decades later.")

However, the common law agency control test read in tandem with the policies of Act provide clear guidance in this case to find in favor of employee status for the Scholarship Athlete-Employees. The Scholarship Athlete-Employees are employees even when the employment relationship that emerges between them and the University is construed as a non-standard employment relationship. *See* Julia Tomassetti, *Who Is a Worker? Partisanship, the National Labor Relations Board, and the Social Content of Employment*, 37 LAW & SOCIAL INQUIRY 815 (2012).¹ To paraphrase Professor Julia Tomassetti, the university context is particularly tricky because, “in the act of consuming labor power that the university has purchased from students,” the university sells athletes education, “both as a social service—in its status as a public goods provider—and as a commodity enhancing students’ lifetime earning capacity.” *Id.* at 816. Because the Board has at times *unrecognized* employees because they are involved in non-standard employment relations, categorically dismissing their claims that they are employees, the Board must tread with care in this case. *See Brevard Achievement Center, Inc. and Transport Workers Union of America, Local 525, AFL-CIO*, 342 NLRB 982 (2004) (NLRB determined in 3-2 decision that disabled janitors were not employees under the Act because they were in an educational, training, and rehabilitative program with the employer). *See also* Catherine Fisk & Deborah Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE LAW JOURNAL 2013–86 (2008).

Despite non-standard employment relationships involved in this case, we argue that Region 13 reached the correct result when it decided that the Scholarship Athlete-Employees

¹ Non-standard employment relationships are those that are not direct, full-time and permanent or, as in cases such as this one, “where the employee produces saleable services for an organization ... and receives services from that organization.” Julia Tomassetti, *Who is a Worker? Partnership, the NLRB, and the Social Content of Employment*, 37 LAW & SOCIAL INQUIRY 815 (2012).

were employees of the University. The Scholarship Athlete-Employees fall under the common law definition of “employee” because, as Region 13 determined, they perform services integral to the Employer’s business and are subject to the Employer’s control in how they perform such services. However, the common law control test is not determinative of employee status. *See* Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 Vanderbilt L. Rev. 857 (2008). The common law control test must be considered in tandem with the policies and purposes of the Act, which we discuss in Section II below. When read in such light, the Board should find in favor of employee status. Finally, *Brown Univ.*, 342 N.L.R.B. 483 (2004) does not prevent the Board from finding that the Scholarship Athlete-Employees are employees under the Act because different from teaching and research assistants whose work is part of their academic degree requirements, the athletic duties of the Scholarship Athlete-Employees are unrelated to their academic ones. Therefore, Scholarship Athlete-Employees are as much employees of the University as its student dining hall employees could be. They should be permitted to choose an exclusive representative, if so is their wish.

A. The Scholarship Athlete-Employees are Employees Under the Common Law

Agency Test

The Act lacks a definition of the term “employee,” compelling the Board, with the approval of the U.S. Supreme Court, to use the traditional common law agency test to establish employee status in those cases where non-standard employment relations surface, such as in the cases of alleged independent contractors. *Roadway Package Sys.*, 326 N.L.R.B. 842, 849-50 (1998); *see also NLRB v. United Insurance Co. of Am.*, 390 U.S.254, 256-257 (1968) *United Insurance* (determining that common law of agency needs to be used to determine employee status under

the NLRA). The common law agency control test, read in tandem with the policies of Act, as described in Section II below, provide clear guidance in this case to find in favor of employee status for the Scholarship Athlete-Employees.

The Restatement (Second) of Agency: Definition of Servant § 220 (1958) defines a servant, e.g., employee, as a “person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.” It then provides a ten-factor test to determine servant, e.g., employee status, in contrast to an “independent contractor.”² Most of the factors relate to control and right of control, such as control over details of the work, the length of time employed, and whether equipment is furnished. In the present case there is no controversy as to whether the Scholarship Athlete-Employees are independent contractors. Rather, as stated above, the controversy lies on whether the Scholarship Athlete-Employees are employees under the Act or “students”. Hence, the most relevant definition for employee in this case under the common law of agency is whether the Scholarship Athlete-Employees are subject to the Employer’s control or right to control. The ten-factor case could provide further insights of where to find, or not, such control or right of control.

² The Restatement (Second) of Agency § 220(2) states: In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

In this case, the University exerts very considerable control over the Scholarship Athlete-Employees and retains very clear contractual rights to further control their work. For example, the grant-in-aid scholarships that some players receive only remain in effect if the Scholarship Athlete-Employees satisfy the demands of the Employer. *Northwestern Univ.*, Case 13-RC-121359, 2014 WL 1246914, at *3 (N.L.R.B. Mar. 26, 2014). The Scholarship Athlete-Employees receive up to \$76,000 in compensation per year, and those who are granted permission to live off campus receive an additional stipend. *Id.* at *12. The Scholarship Athlete-Employees sign a contract, which the employer calls a “tender,” that explicitly sets out the terms and conditions that the Scholarship Athlete-Employees must abide by. *Id.* at *13. As part of this tender, the Scholarship Athlete-Employees agree to work only for the Employer unless otherwise granted permission. *Id.* at *14. However, no permission for other work shall ever be granted if the other work is related to the Scholarship Athlete-Employee’s athletic ability and/or reputation as a football player. *Id.* at *13. This essentially gives the Employer a monopoly on profiting off of the Scholarship Athlete-Employee’s athletic feats. It also leaves the Scholarship Athlete-Employees completely dependent upon the Employer to be able to attend the University, and also to secure food, housing, clothing, and any other basic necessities the Scholarship Athlete-Employees may require. *Id.* The scholarship is directly tied to the Scholarship Athlete-Employee status as a football player: if the player decides to quit the football team or if the coaching staff decides that the player is not following the University’s mandated team rules, the Scholarship Athlete-Employee will lose his scholarship. *Id.* at *3. Having lost the means to compensation, he will then have to find employment elsewhere to support himself and/or to continue his education at the University.

Also, the college education provided by the Employer to the Scholarship Athlete-Employees constitutes payment in and of itself, even without tying it to the monetary value of the education. Region 13 correctly points out that although “the players do not receive a paycheck in the traditional sense, they nevertheless receive a substantial economic benefit for playing football.” *Id.* at *12. When compensation is discussed in the case law it is only described as “financial or other compensation.” *See Town & Country*, 516 U.S. at 90; *Seattle Opera v. NLRB*, 292 F.3d 757, 762 (D.C. Cir. 2002); *Brown Univ.*, 342 N.L.R.B. 483, 496 (2004). Separating “other compensation” from “financial” clearly suggests that the compensation need not be of a monetary value. Employees can be compensated in multiple forms, such as by an education. Therefore, even without attaching a price tag to the education afforded to the Scholarship Athlete-Employees, the education itself is compensation for services performed.

Furthermore, the employer exhibits substantial control over the Scholarship Athlete-Employees in multiple other ways. The coaches, who serve as supervisors over the Scholarship Athlete-Employees, mandate what positions the Scholarship Athlete-Employees will play, how they will play the game, how they will train for the game, and how they will stay in shape during the off-season. *Northwestern Univ.*, 2014 WL 1246914, at *4-8. However, the control is even more apparent in how the Scholarship Athlete-Employees must live their lives off the field. The Employer mandates the Scholarship Athlete-Employees’ use of alcohol and drugs, gambling, and what they may say to the media or post on the Internet. *Id.* at *3. Even more controlling is how the Employer supervises the Scholarship Athlete-Employees’ living arrangements, and suppresses their ability to apply for outside employment, to drive personal vehicles, and even to travel off campus. *Id.* at *14. The Employer strictly sets the Scholarship Athlete-Employees’ itinerary during both the season and the off-season, at times controlling their schedule from the

time they wake up to the time they go to bed. *Id.* at 4. This itinerary consists of forty to fifty hours of work during the season, and fifty to sixty hours during training camp – well over the traditional forty-hour work week. *Id.* at *4-5.

In conclusion, the Scholarship Athlete-Employees have a full time job at the University, which is playing college football. Denying employee status to the Scholarship Athlete-Employees would therefore not only further their precarious employment relationship, but will categorically dismiss the very fact that they work for the University and produce substantial economic benefit for it.

B. *Brown* Does Not Prevent The Scholarship Athlete-Employees From Being Statutory Employees

Region 13 correctly held that *Brown* does not apply to the Scholarship Athlete-Employees. We agree with that determination because the Scholarship Athlete-Employees' athletic activities are independent from their academic degree requirements at the University. Unlike the graduate student teaching assistants ("TAs") in *Brown* whose TA duties were part of their academic requirements, playing football has no relationship to student status. *See Brown* at 484-485. Playing good or mediocre football has no relationship to excelling or not in biology, physics, calculus or any other course at the University. The Scholarship Athlete-Employees' relationship to their student duties in this case is the same as that of the student cafeteria workers to their academic activities. There is universal consensus that students who work for the University dining hall are not pursuing academic activities through their dining hall work and, as such, are statutory employees. *See Martin H. Malin, Student Employees and Collective Bargaining*, 69 Ky. L.J. 1, 2 (1980-1981). Playing football has no more relationship to students'

aspirations to become doctors or lawyers than working in the dining hall. Therefore, *Brown* does not prevent the Board from finding that the Scholarship Athlete-Employees are employees under the Act.

In fact, one could argue that the case at hand was a closer case if the Scholarship Athlete-Employees were majoring in physical education and playing football was explicitly part of their academic requirements. But even there, they would be considered employees under the NLRA under *Boston Medical Center Corporation*, 330 NLRB No. 152 (1999). In *Boston Medical Center Corporation*, the Board determined that medical residents and interns were employees even though their labor was explicitly tied to their education and training as doctors. *Id. at* 152. Therefore, *Brown* not only does not prevent from finding the Scholarship Athlete-Employees to be employees under the Act, but other Board law such as *Boston Medical Center* provides for a finding of employee status in the case at hand.

II. THE ACT'S PURPOSES TO EQUALIZE BARGAINING RELATIONSHIPS AND MAINTAIN INDUSTRIAL PEACE WOULD BE FRUSTRATED IF THE SCHOLARSHIP ATHLETE-EMPLOYEES ARE NOT GRANTED EMPLOYEE STATUS

An enormous cast of participants harvests a wealth of riches from major college sports. Universities derive enormous revenues and other indirect, but vital, benefits from successful athletic programs.... The NCAA supports itself entirely by revenues generated from selling broadcasting rights of its members' games. Many coaches are compensated lavishly for producing successful programs. Media enterprises generate rich advertising revenues by airing college athletic events. Indeed, college sports constitute a \$60 billion industry.

Amy McCormick & Robert McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 San Diego L. Rev. 495, 496-97 (2008).

While the Scholarship Athlete-Employees in this case are employees under the common law control test, such test is not determinative of employee status. *See* Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 *Vanderbilt L. Rev.* 857 (2008) (“These disputes cannot be understood with the traditional tools used to analyze the scope of the employment relationship—tools derived from agency law and focused on the issue of organizational control over the worker.”). Rather, we must also focus on whether the putative employees are the kinds of the individuals that the Act more generally aims to protect: those who are providing a valuable service to another but who are in an asymmetrical relationship with that party, and are engaged in disputes over the terms and conditions of their work. It is transparent from the facts determined by Region 13 and from general knowledge of contemporary college football that commercial relationships have usurped traditional roles in universities, principally in college football, even as Scholarship Athlete-Employees attempt to obtain an education from the University. By extending employee status to the Scholarship Athlete-Employees the NLRB would enable the Scholarship Athlete-Employees not only to bargain over the terms and conditions with the University, but also the extent of their employee status with the University. If the Board dismissed the Scholarship Athlete-Employees as non-employees, it would leave these young people to bargain individually and in an abysmally asymmetrical relationship with the University, terms such as health care, discipline, and their capacity to benefit from their image –current issues creating significant labor strife in college football.

A. The College Football Industry is a Multi-Billion Dollar Industry Full of Labor-Management Conflicts Deserving of NLRA Coverage.

The U.S. Supreme Court stated in 1980 that principles developed for use in the industrial setting cannot be “imposed blindly on the academic world.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980) (citing *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973)); *see also Brown Univ.*, 342 N.L.R.B. at 487. However, a lot has changed in American universities since 1980 and particularly in college football, which has become a multi-billion dollar industry with many stakeholders, including the players.³ This multi-billion dollar industry is fraught with industrial disputes, small and big. The Act was designed to encompass industries like the college football industry. The architects of the Act desired a more level playing field where employees could collectively organize on their behalf against what was viewed as a much larger, much more powerful entity- the employer. The employers of the college football industry have become exactly that type of overpowering entity. Similar to other industries, the college football industry provides a product (college football) and is composed of employers that facilitate the making of the product (the universities), the players and possible Scholarship Athlete-Employee who produce the product, and the purchasers of the product (the fans). The Employer here has even organized with other employers to form a conglomerate organization, the NCAA, that helps represent their interests. In order to realize the purpose of the Act, the Scholarship Athlete-Employees must be able to exercise their rights under the Act .

It is no secret that college football is a highly lucrative industry with gross revenue totaling in the billions of dollars. *See, e.g*, Sean Gregory, *Should This Kid Be Making \$225,047 A Year for Playing College Football?*, Time, Sep. 16, 2013, at 36. In 2010, college football generated over \$2 billion in revenue and \$1.1 billion in profit. Doug J. Chung, *The Dynamic Advertising Effect of Collegiate Athletics*, Marketing Sci., Sept.-Oct., 2013, at 679, 681. Each

³ We are using the generic term “player” in this section because we do not want to make the argument that all college football players in all universities and colleges are employees under the Act. Such a determination must be made in a case-by-case basis that applies the common law agency test and the NLRA’s policies.

college football player could be paid by their respective universities about \$225,000. Gregory, *Should This Kid Be Making \$225,047 A Year for Playing College Football?*, at 36. However, NCAA rules forbid such payment. *Northwestern Univ.*, 2014 WL 1246914, at *13. Most of what the players receive is a scholarship worth up to \$76,000 a year. *Id.* at *17. The lopsided bargain between the players and the universities have led to a number of high profile disputes, including that between Texas A&M University and one of its star players, Johnny Manziel, who was suspended for one half-game for allegedly accepting money for signing autographs, a violation of NCAA rules. *Half-game penalty for Johnny Manziel*, ESPN (Aug. 29, 2013), m.espn.go.com/ncf/story?storyId=9609389.

It is also common knowledge that college football is a wildly popular sport and is supported by a huge marketing campaign. The total fan base is 103 million people, which represents one-third of the United States population. Chung, *The Dynamic Advertising Effect of Collegiate Athletics*, at 679. College football is currently the third most popular sport in the United States, more so than professional basketball and professional hockey. Regina A. Corso, *As American as Mom, Apple Pie and Football?*, Harris Polls (Jan. 16, 2014), *available at* <http://www.harrisinteractive.com>. Eleven percent of Americans claim college football is their favorite sport. *Id.* This number is even higher in certain parts of the country: seventeen percent of the South claims college football as its favorite sport. *Id.* In fact, there are nine college football teams that are considered even more popular than their professional counterparts in the same region. Amy Daughters, *7 Teams That Are More Popular Than Their NFL Counterparts*, Bleacher Sports, <http://bleacherreport.com/articles/737969-college-football-7-teams-that-are-more-popular-than-their-nfl-counterparts/page/2> (Tennessee, Arizona/Arizona State, Michigan, Ohio State, Georgia, Florida, North Carolina/South Carolina).

Like other industries, the college football system works hard to maintain its massive and dedicated fan base through television and other media. More than 213 million people watched college football on television during the 2011 season, and approximately 127 million viewers watched one of the thirty-five bowl games.⁴ *College Football Maintains Impressive Ratings and Attendance Figures*, Nat'l Football Found. (Mar. 8, 2012), <http://www.footballfoundation.org/tabid/567/article/51405/College-Football-Maintains-Impressive-Ratings-and-Attendance-Figures.aspx>. College football games are televised on every major national sports network, including ESPN, NBC, ABC, CBS, and Fox, as well as regional and local outlets. *Id.* The separate football conferences have even created their own networks, including the University's conference, the Big Ten. *Id.* The University's football team was the twentieth most watched football team in 2013, with almost 2.7 million viewers per game. *College Football TV Ratings*, Sports Media Watch (2014), <http://www.sportsmediawatch.com/college-football-tv-ratings>. This included the most watched game for the week of October 3, when the University's football team played Ohio State and brought in 7,360,000 viewers. *Id.* The immense television popularity of college football shows that the college football industry utilizes the traditional media outlets that other industries do, and that multiple different media companies profit off of the Scholarship Athlete-Employees in this case and all putative Scholarship Athlete-Employees, providing their service to the employers, all of which it gets a piece of.

The marketing campaigns also succeed in bringing in large crowds of spectators. In 2011, nearly fifty million spectators purchased tickets to watch college football players play in one of the many college football stadiums across the country. *College Football Maintains Impressive*

⁴ A "bowl game" is a college football playoff game. Teams must qualify to play in a bowl game, and can only play in one per season.

Ratings and Attendance Figures, Nat'l Football Found. That same year, the bowl games alone attracted 1,765,224 fans to the stadiums. *Id.* The highest attended bowl, the Rose Bowl, sold 91,245 tickets, continuing its sell-out streak dating back to 1947. *Id.* The bowl games paid out a total of \$282 million to all the schools and their respective sports conferences. *College Football Maintains Impressive Ratings and Attendance Figures*, Nat'l Football Found. Also, an estimated \$1.6 billion was generated from travel and tourism because of the college football bowl games. *Id.*

On December 31, 2011, the University's football team played Texas A&M's football team in the Meineke Car Care Bowl of Texas at the Reliant Stadium in Houston. Nearly 70,000 tickets were sold; this was the sixth highest attendance of all thirty-five bowl games. *Id.* Nearly four million viewers tuned in to watch the game on television. *Id.* The University was paid \$1.7 million for having its Scholarship Athlete-Employees play in the Meineke Car Care Bowl, despite losing the game and finishing with a mediocre six wins and six losses for the season.

The Employer also generates revenue and school publicity from selling numerous types of football merchandise. The Employer's "official school store" is not on the school's non-profit website, but instead on CBS Sports College Network's for-profit site. *The Official Online Store of the Northwestern Wildcats*, CBS Sports, https://northwestern.cbssportscollection.com/store.cfm?store_id=176 (last visited June 17, 2014). At that site, you can purchase anything from the University's football jerseys that are replicas of what the Scholarship Athlete-Employees wear (\$89.95), helmets (\$299.99), t-shirts (\$45), and even Northwestern child football jerseys (\$59.95). *Id.* Consumers can also buy massive amounts of other paraphernalia, such as the University's football flags (\$34.99), dog treats (\$6.98), and mouse pads (\$9.99). *Id.* All items sold prominently display "Northwestern Football" on them;

they are not memorabilia for the school in general, but specifically for the football team. *Id.* Other major companies also advertise and sell the University's football merchandise directly through their websites, such as Under Armour and Fanatics. *See Northwestern Wildcats Shop*, Fanatics, http://www.fanatics.com/COLLEGE_Northwestern_Wildcats (last visited June 17, 2014); *Northwestern Wounded Warrior Uniforms*, Under Armour, <http://www.underarmour.com/shop/us/en/armoured/northwestern-university-uniforms> (last visited June 17, 2014).

There are even video games made in the likeness of the Scholarship Athlete-Employees. The NCAA and EA Sports, a major video game company, recently settled a lawsuit with college basketball and football players for profiting off the likeness of the employees in NCAA-branded video games. Ben Strauss & Steve Eder, *N.C.A.A. Settles One Video Game Suit for \$20 Million as a Second Begins*, N.Y. Times, June 10, 2014, at B11. EA Sports paid out \$40 million to the players, while the NCAA paid out \$20 million. *Id.* Yet another suit regarding the video games has recently begun in federal court, where the players are demanding direct payment for their appearance in the video game. *Id.* The University's Athlete-Employees have been featured in such games in the past; the most recent video game features Kain Colter performing his "signature football move." Rodger Sherman, *Keeping it Real with EA Sports*, Sippin' On Purple (July 19, 2013), <http://www.sippinonpurple.com/northwestern-wildcats-football/2013/7/19/4537598/venric-mark-kain-colter-option-northwestern-wildcats-football>. These massive settlements show what other large corporations, like EA Sports, are willing to pay the Scholarship Athlete-Employees to be able to profit off of their services, generating further possibilities of industrial disputes over pay and terms and conditions of employment.

B. The Act Must be Interpreted Broadly in Favor of Granting Employee Status

The Supreme Court's and Board's "broad and historic interpretation of the Act" requires an inclusive interpretation of the statute which would cover the Scholarship Athlete-Employees under the protection of the Act. *See New York Univ.*, 332 N.L.R.B. 1205, 1209 (2000); *NLRB v. Town & Country Elec.*, 516 U.S. 85, 91-92 (1995); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). § 2(3) of the Act defines an employee as "any employee," with certain specific exceptions. "Student" is not one of those exceptions, and such an interpretation should not be imposed upon the Act. *See New York Univ.*, 332 N.L.R.B. at 1205 ("There is no basis to deny...rights to statutory employees merely because they are...students."); *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999) ("[N]othing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act.").

Furthermore, the congressional intent of the Act is explicit in desiring broad coverage of the Act. The Act was passed with the intention of having significant impact on labor relations by compelling employers to bargain with employees. These goals have been understood namely to be industrial peace, collective bargaining, rearrangement of relative bargaining power, among others. Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 1937-1941, 62 MINN. L. REV. 265, 292-93 (1977). The Court has been clear that Congress intended to protect "the right of employees to organize for mutual aid without employer interference," *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945), and "encouraging and protecting the collective-bargaining process," *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984). There must be explicit reasons for denying such protection to a certain group, especially one as large as collegiate football players. *See id.* at 891-92 (a group falls under the protection of the Act unless specifically excluded from it). **There are likely over 10,000 football players receiving scholarships at one-hundred and twenty universities.** *See* Ryan

Wood, *Crunching the Numbers: Football Scholarships*, Active (2014), <http://www.active.com/football/articles/crunching-the-numbers-football-scholarships>. **Denying this group employee status would thus exclude a significant number of individuals from statutory labor protections.**

Furthermore, when Congress has deemed it necessary, it has acted to exclude certain groups from coverage. *See* 29 U.S.C. § 152(3) (1988 ed.), *construed in Town & Country*, 516 U.S. at 92 (“amending Act to overrule *Hearst* and *Packard* by explicitly excluding independent contractors and supervisory employees”). Although the University prefers to call its Scholarship Athlete-Employees “student-athletes,” a term originally coined by the industry to deny the Scholarship Athlete-Employees workers’ compensation insurance, *see infra* Part II.E, this does not automatically disqualify the Scholarship Athlete-Employees from having employee status. The Court has held that there is no “magic phrase” associated with the common-law agency test. *NLRB v. United Insurance Co. of Am.*, 390 U.S. 254, 258 (1968). Congress has refrained from excluding students or any other group in which the Employer attempts to place the Scholarship Athlete-Employees. Therefore, because the Act is designed to be applied broadly and the Scholarship Athlete-Employees have not been categorically excluded from its coverage, the Board must find that the Scholarship Athlete-Employees are statutory employees under the Act.

C. The Athletes-Employees’ Demands are Typical of Statutory Employees and are Suitable for Resolution Through Collective Bargaining

The Scholarship Athlete-Employees have similar workplace demands as traditional employees, and they have no way of having their voice heard, absent labor strife, to concoct change in the workplace. The Act was enacted with the purpose of allowing employees to have a voice without necessarily resorting to such labor strife. The Scholarship Athlete-Employees have

traditional workplace concerns that they have the statutory right to bargain over. Besides eliminating restrictions on their ability to acquire compensation, nearly every potential demand is something that has already been bargained for in other professions, particularly by the NFL players' union (NFLPA). In fact, one of the driving forces behind the Scholarship Athlete-Employees demanding a union – having protection from football-related injuries that are not felt until later in life, such as concussions – is also the biggest labor strife the NFLPA currently has with the NFL. *See* Jeffrey Eisenband, *Who Is Kain Colter?*, *The Post Game* (Jan. 29, 2014), <http://www.thepostgame.com/blog/men-action/201401/kain-colter-northwestern-football-college-sports-union>. The schools themselves have organized their power via the NCAA, expanding their already great power. The Scholarship Athlete-Employees must be allowed to have an answer to the Employer's organization with their own.

The Scholarship Athlete-Employees are subject to traditional disciplinary measures, and must be able to bargain over what the terms of discipline are. *See Northwestern Univ.*, 2014 WL 1246914, at *2-4, 14. The team handbook and the tender signed by the Scholarship Athlete-Employees lay out strict guidelines that determine what they can be punished for and what the punishment may be. *Id.* The punishments could result in loss of compensation, suspension from the team, or even being terminated; again, just like traditional disciplinary measures in other jobs. *Id.* at *3, 14. If a Scholarship Athlete-Employee is tardy to work or fails to show up, discipline will result. *Id.* at *4, 14. Scholarship Athlete-Employees may even be disciplined for “embarrassing” the team. *Id.* at *3. Such blanket, vague terms are a major part of why employees bargain for more explicit terms in collective bargaining contracts; employees generally want to know what they can and cannot do so they may avoid being disciplined. Just to name one prominent example that appeared in the press, Texas A&M quarterback Johnny Manziel was

suspended for one half-game for allegedly accepting money for signing autographs, a violation of NCAA rules. *Half-game penalty for Johnny Manziel*, ESPN. This punishment came despite the NCAA, which is entirely self-regulated, having no evidence at all. *Id.* The Employer's ability to discipline mirrors that of other industries, and the Scholarship Athlete-Employees here must have the right to voice concern over what disciplinary action can be instituted for and the measures imposed.

The Scholarship Athlete-Employees are also subjected to stringent work schedules, and like other employees, must have a say in their hours worked. *See Northwestern Univ.*, 2014 WL 1246914, at *4-8. Being able to set the terms and conditions surrounding when employees must work is a major and common subject of collective bargaining. The hours that the Athlete-Employees are subjected to are likewise a major point of contention between the employees and management. *Northwestern Univ.*, 2014 WL 1246914, at *9-10. The Scholarship Athlete-Employees must work, during certain parts of the year, up to sixty hours a week. *Northwestern Univ.*, 2014 WL 1246914, at *4-8. The Scholarship Athlete-Employees have little say in when they must work; the Employer schedules the games, and besides having some say in moving practices because of classes, the employees work at the whim of the management-imposed schedule. *Id.* The team handbook states that the academics will take precedence over athletic employee duties; Scholarship Athlete-Employees are under the impression that they will be able to engage in academic endeavors while employed on the football team. *Id.* at *10. In refusing to grant the Scholarship Athlete-Employee any say in their schedule, this clause in the handbook is severely diluted. The Scholarship Athlete-Employees must have a mechanism available to enforce this handbook. Like statutory employees at other jobs, the Scholarship Athlete-Employees must have the right to negotiate with the Employer as to both the amount of hours

worked and when they are worked, both of which traditionally fall under the terms and conditions of employment.

Compensation is also one of the more traditional terms and conditions of employment that employees have a right to bargain over. Here, the issue is not simply the amount of compensation they will receive, but whether they have the right to receive compensation at all, even if from third parties. The Employer may have the right to restrict who the Scholarship Athlete-Employees can do business with, but it should not be able to prohibit *all* business without first having to meaningfully negotiate. For example, in collective bargaining negotiations the Scholarship Athlete-Employees may agree to not do business with Nike because the Employer has an endorsement deal with Under Armour. But a full prohibition on any kind of compensation with anybody seems overly restrictive, almost promises labor strife, as we have seen in the video game and signatures cases; under the Act the Scholarship Athlete-Employees should have a say in how restrictive such policies should be. Furthermore, the penalties for profiting off of football ability can be very severe. *Id.* at *2. The University's Scholarship Athlete-Employees must be able to negotiate how they may obtain compensation for their skills. There is obviously a huge market for the Scholarship Athlete-Employees' images, and the Employer and other universities are collectively profiting off of such images. Scholarship Athlete-Employees seem to have no meaningful ability to negotiate such terms and conditions of employment at the present time.

Also, football is an inherently dangerous sport, and players must have the ability to negotiate such issues that affect their safety, such as health insurance, equipment, and rule changes. Concussions are an ever-increasing worry with football, and the NCAA has simply passed the buck to the schools. Ken Reed, *NCAA's Approach to Concussions is Barbaric*,

Huffington Post (Aug. 14, 2013), http://www.huffingtonpost.com/ken-reed/ncaa-football-concussions_b_3757585.html. Two-hundred concussions were reported in college football last season, and this number would likely be higher if all concussions were actually reported.

Timothy Bella, *NCAA head games: The ‘very skewed’ concussion data in college football*, Aljazeera America (Jan. 9, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2014/1/9/ncaa-head-games-theveryskewedconcussiondataincollegefootball.html>. After Kain Colter suffered a concussion last season, his coach was extremely lax about getting him rest. Only three days after Colter was concussed, the coach stated, “I doubt he’s going to get any reps today, but he’ll be out there at practice and from there we’ll see how the week progresses.” Patrick Stevens, *Quarterback Kain Colter remains day-to-day with concussion*, Syracuse.com (Sept. 13, 2013), http://www.syracuse.com/patrick-stevens/index.ssf/2013/09/northwestern_football_quarterb.html. It is important for the Scholarship Athlete-Employees to have the right to negotiate with the Employer issues pertaining to their safety at work. In fact, being protected from such injuries is perhaps the Scholarship Athlete-Employees’ most urgent bargaining subject. Jeffrey Eisenband, *Who Is Kain Colter?*. The concern is not just when the concussions happen, but also fear over the lasting effects of playing football: “There needs to be a guarantee that players aren’t stuck with medical bills after they leave with long-lasting injuries that they suffer from football. Essentially, they’re hurt on the job and then they’re stuck with the medical bills if they do need a surgery down the line. That’s one of the biggest things,” said Colter. *Id.* Concern at the University ran so high that one of the school’s former Athlete-Employees was one of two named plaintiffs in a class action law suit against the NCAA for its (lack of) concussion policies. This former player claims he

suffers concussion-like symptoms from taking numerous hits while playing football for the University from 2004-08. Phillip Rossman-Reich, *Former Northwestern Lineman At Front of NCAA Concussion Battle*, Lake The Posts (Sept. 30, 2011), <http://www.laketheposts.com/2011/09/30/northwestern-concussion-battle-092911>. When the risks to the Scholarship Athlete-Employees are so high, they must have the ability to protect themselves by negotiating with the Employer what can be done. This type of protection strikes at the Scholarship Athlete-Employees' right to bargain for a safe workplace, and thus strikes at a core purpose of the Act.

D. The Scholarship Athlete-Employees Must Be Protected Because their Employment with the University Has an Indelible Mark on their Ability to Get Hired by the NFL

The Division I college football system that the Employer and Scholarship Athlete-Employees belong to serves to funnel players in to the NFL. How the players perform while playing for the Employer has a drastic effect on what order they may be drafted in to the NFL, which correlates with their starting salary. For example, the first overall pick of the 2014 NFL draft is projected to sign a four-year deal worth \$22,272,988, the player selected tenth overall is projected to sign a \$12,249,149 deal, and the player selected thirty-second overall (the end of the first round) is projected to sign a deal worth \$6,849,502. Jason Belzer, *2014 NFL Draft 1st Round Rookie Salary Projections*, Forbes (May 9, 2014), <http://www.forbes.com/sites/jasonbelzer/2014/05/09/2014-nfl-draft-1st-round-rookie-salary-projections>. Players are drafted based on how they performed in college. The amount of compensation putative Scholarship Athlete-Employees ultimately receive for football-related activities post-college is directly tied to their performance in the college system, over which the Employer has ultimate control, as discussed earlier.

Furthermore, putative Scholarship Athlete-Employees can drop significantly in the NFL draft based on the employer's disciplinary actions or general reports of the player's "character." Jerry McDonald, *NFL Draft: Character a major part of equation*, San Jose Mercury News (May 6, 2014), http://www.mercurynews.com/raiders/ci_25709276/nfl-draft-character-major-part-equation. Being the gateway to the NFL, the Employer's evaluation of a Scholarship Athlete-Employee has considerable effect on his draft status. For example, one putative Scholarship Athlete-Employee from Oklahoma, Stacy McGee, was recruited as a top high-school player in the country at his position. *Id.* However, due to multiple suspensions issued by his university, one as vague as "for violating university rules in the preseason," his draft prospect sunk. *Id.* NFL.com's scouting report cited his weaknesses as "multiple off-the-field incidents; suspensions," and his "bottom line [was]: McGee has all the physical attributes to be a contributor.... However, between a lack of production throughout his career, multiple off the field incidents, and suspensions, he is unlikely to be drafted." *2013 Draft Prospects: Stacy McGee*, NFL, <http://www.nfl.com/draft/2011/profiles/stacy-mcgee?id=2539285> (last visited June 17, 2014). Despite his employer's suspensions resulting in McGee, once a perennial recruit, dropping to the sixth round in the draft, he has since "become a key part of [his NFL team's] defensive line rotation. Jerry McDonald, *Raiders' Stacy McGee hitting his stride*, San Jose Mercury News (Nov. 22, 2013), http://www.mercurynews.com/raiders/ci_24582937/raiders-stacy-mcgee-hitting-his-stride. He "was a controversial selection [due to college] suspensions for breaking team rules," but has shown to be a good example of a player whose employer-imposed disciplinary measures affected his draft status, but who proved to be an asset to his professional team. *Id.* Such pre-professional disciplines during college football, which may cost putative

Scholarship Athlete-Employees their careers, only promises labor-management strife that could be resolved through NLRA coverage.

Also, when Manziel was being investigated for receiving compensation for autographs, it was unclear what his punishment would be, if any. *Half-game penalty for Johnny Manziel*, ESPN. If a player is prohibited from showcasing his talent due to a long suspension, that would obviously have a dire effect on that player's draft status. When the NCAA announced that Manziel would only be receiving a one-half game suspension, his odds of winning the Heisman Trophy (most valuable player in college football) increased dramatically from 12-1 to 6-1. *Half-game penalty for Johnny Manziel*, ESPN. Winning the Heisman and thus being considered the best player in college football would obviously garner attention from the NFL. Being mostly absolved of any serious wrongdoing, Manziel was drafted in the first round of the NFL draft. Pat McManamon, *Johnny Manziel drafted by Browns*, ESPN (May 9, 2014), http://espn.go.com/nfl/draft2014/story/_/id/10903195/2014-nfl-draft-johnny-manziel-drafted-cleveland-browns-no-22-overall-pick. These employer imposed rules can often, as Forbes has described, "cost[] both millions in current and future incomes, revenues, and reputational namesake." Patrick Rishe, *Cam-ibalized: The Financial Repercussions of the Cam Newton Scandal*, Forbes (Nov. 10, 2010), <http://www.forbes.com/sites/sportsmoney/2010/11/10/cam-ibalized-the-financial-repercussions-of-the-cam-newton-scandal>. Particularly because the employees' future career and ability to be compensated later on in life are at stake, the employees must be able to negotiate for more job security while providing their services to the employer. Again, these conflicts only promise more future labor strife between a powerful and organized employer group on one side, and a non-organized Scholarship Athlete-Employee side in college football. NLRA coverage in this case is thus warranted.

E. The Term “Student-Athlete” Was Coined by Management to Deny Labor and Employment Rights to Scholarship Athlete-Employees

The Employer continues to argue that its Scholarship Athlete-Employees are merely students who happen to also be athletes, that they are the prototype of the kid next door who likes to have fun playing games while learning the three Rs. The term “student-athlete” instills a sense of innocence, and attempts to remind us that these are not workers, they are kids. However, this term was invented in the 1950s as a formulaic strategy to “fight against workmen’s compensation insurance claims for injured football players.” Taylor Branch, *The Shame of College Sports*, The Atlantic (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643>. The brutality of football was well known and damaging the sport’s reputation, in turn hurting universities’ ability to profit off of it. *Id.* The term was crafted when a likely Scholarship Athlete-Employee was killed from football-related injuries, and his widow filed for workers’ compensation death benefits. She was ultimately denied such benefits by the Colorado Supreme Court. *Id.* The term was used as a strategy to convince society that college football should be treated differently and should have to play by a different set of rules than the rest of corporate America; it should not have to pay for the injuries, paralyzed players, and even deaths of the employer’s fallen, putative Scholarship Athlete-Employees. *Id.*

The term has worked so well because it has served the dual purpose of reminding the Scholarship Athlete-Employees that they are athletes who must perform the requested athletic services for their employer, while giving the impression to the rest of the world that they are merely students. In response to the Scholarship Athlete-Employees’ attempts to unionize and exercise their statutory rights, the NCAA has described the Scholarship Athlete-Employees

organizing drive as a “union-backed attempt to turn student-athletes into employees.” Tom Farrey, *Kain Colter starts union movement*, ESPN (Jan. 28, 2014), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union. The Employer has stated that the Scholarship Athlete-Employees should vote “no” during the union election to “get back to being students.” Nick Bromberg, *Document shows Northwestern’s anti-union responses...*, Yahoo Sports (Apr. 20, 2014), <https://sports.yahoo.com/blogs/ncaaf-dr-saturday/document-shows-northwestern-s-anti-union-responses-to-questions-from-players-024103369.html>. As stated earlier, the terms “student” and “employee” are not opposites; you can be both one and the other simultaneously. In fact, many are: it is extremely common for students to work jobs, including ones on the campus cafeteria, for example. But the difference between the student school cafeteria worker and the football player is that there are immense profits in college football, and the Employer will continue to try to convince society that these players are “student-athletes,” which for some magical reason apparently means they have no statutory rights.

CONCLUSION

For the foregoing reasons, the decision of Region 13 of the NLRB should be affirmed.

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